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In the Supreme Court of the United States

OCTOBER TERM, 1976

DOVER CORPORATION, NORRIS DIVISION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 45a-57a)[1] is reported at 535 F. 2d 1205. The National Labor Relations Board's decision and order (Pet. App. 1a-43a) are reported at 211 NLRB 955.

JURISDICTION

The judgment of the court of appeals (Pet. App. 59a-60a) was entered on June 4, 1976. The petition for a writ of certiorari was filed on September 1, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]"Pet. App." refers to the appendix to the petition and "A." to the joint appendix to the briefs in the court of appeals.

QUESTIONS PRESENTED

1. Whether substantial evidence supports the National Labor Relations Board's finding that a company violated Section 8(a)(1) of the National Labor Relations Act because it did not adequately repudiate threats of discharge for union activity made by a company supervisor to two employees.

2. Whether, in the circumstances of this case, the cease-and-desist order issued by the Board was appropriate.

STATUTE INVOLVED

Most of the relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are set forth at Pet. App. 65a-73a. The following provisions are also relevant:

Section 8.

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * * * *

Section 7.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activies * * *.

STATEMENT

In May 1973, a union began an organizing campaign at one of petitioner's manufacturing plants in the area of Tulsa, Oklahoma (Pet. App. 46a; A. 67-68, 143). On July 13, Walter Rike, a Company supervisor, said to employee Charles Thompson at his workplace, "I don't see why you guys want a union in here, because you have better benefits and wages than the Norris plant does." The Norris facility, also in the Tulsa area, is unionized. Rike was holding in his hand a booklet which appeared to Thompson to be an expired contract from the other plant. Later that day, Thompson told Rike that he and other employees objected to Rike's using the expired contract. Rike replied, "If you guys are going to play this way, I have enough on the five of you to get you discharged for union activities." (Pet. App. 47a, 30a-31a; A. 83-85, 114-115.)

A week after this incident, the Assistant Plant Superintendent and the Company attorney came to see several employees in the plant concerning reports that they had been threatened by Company supervisors with reprisals for union activities. Thompson was one of the employees contacted. He was told by the Company attorney that the employees had the right to organize and could not be interfered with for doing so, and that the Company would "take action on this if it were true." Neither Company spokesman made specific reference to Supervisor Rike, nor was there evidence that Rike was disciplined or criticized in any way for his remarks to Thompson. (Pet. App. 47a, 31a-32a; A. 93, 129.)

The same day, July 20, the Company posted a notice in the plant stating, *inter alia*, that supervisors "are somewhat limited in what they can say about unions" and that the Company's supervisors had been instructed

not to interfere with the rights of employees to campaign either for or against unions. Six men, including Rike, were listed as plant supervisors, and the notice specifically distinguished between leadmen whose statements "for or against unions are their own opinions," and "the supervisors named above," who were "[t]he only people who can make statements on behalf of the company." (Pet. App. 48a-49a; A. 55-56, 76-78.)

On August 8, Supervisor Rike approached James Curry at his work station and told him that "the people who are pushing the union" would probably be fired, depending on the outcome of the organizational campaign. Curry, like Thompson, was a known union adherent (Pet. App. 24a, 49a; A. 71, 73, 87-88.) Although the Company later that month posted an official Board election notice stating that a representation election would be held, and listing employee rights protected against interference by employers and unions, no Company representative gave Curry any assurances against reprisals after this incident (Pet. App. 31a; A. 57, 78-80).

Rike did not directly supervise Curry and Thompson. However, as the supervisor of three inspectors who checked the quality of Curry's and Thompson's work in turning out machine parts on turret lathes, Rike had the final responsibility for approving the quality of work done by them and could direct his inspectors to require these employees to redo unsatisfactory work. (Pet. App. 13a-14a, 24a; A. 82, 116, 131-133, 136-141.)

On the foregoing facts, the Board found (Pet. App. 13a-14a) that the Company's efforts to counteract Rike's coercive statements were inadequate and that the statements were violations of Section 8(a)(1) of the Act,

29 U.S.C. 158(a)(1).[2] It ordered the Company to cease and desist from making statements like those found to have been made by Rike, and to post an appropriate notice (Pet. App. 15a-16a).

The court of appeals enforced the Board's order with a minor modification not here relevant (Pet. App. 56a-57a). The court noted that "the remarks by Rike found to have been made were strong ones," and held that the Board had not erred either in determining that the Company had not adequately remedied the impact of the threats, or in deciding that issuance of a remedial order was warranted in all the circumstances (Pet. App. 54a-55a).

ARGUMENT

The present case turns on the Board's assessment of the impact of discharge threats in a particular factual setting, and neither the Board's decision nor the decision of the court of appeals conflicts with any decision of this Court or of any court of appeals.

1. In the present case, two especially coercive statements—threats of discharge for union activities—were made by an admitted Company supervisor to two employees on two separate occasions. While Company spokesmen assured employees after the first incident that such remarks were not authorized, the same supervisor—identified in a plant notice as one of the "people who can make statements on behalf of the company"—again threatened that union activists might be discharged. Employees who knew of these threats thus

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[2]The Board, reversing the Administrative Law Judge, found that there was insufficient evidence to prove a further allegation in the complaint that the Company had threatened a third employee in violation of Secion 8(a)(1) of the Act (Pet. App. 14a-15a).

could well have believed that the plant notice and statements by other Company spokesmen affirming the employees' rights to engage in concerted activities were mere window dressing and that Supervisor Rike was conveying the real attitudes of management. In addition, as the Board found (Pet. App. 13a-14a), the authority of Rike himself over employees, including those to whom the remarks were made, was such that they would fear his enmity. Thus, regardless of whether the Company was actively seeking to discourage union activities, it was "in a position to secure [an] advantage" from Rike's threats *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U.S. 514, 520.

Contrary to the Company's contention (Pet. 13), the Board did not create a rationale under which an employer "is powerless to voluntarily expunge the effects of unauthorized statements of its supervisors." The Board simply found that, in the circumstances here, the Company had not done enough to expunge the effects of such statements. As the Company points out (Pet. 12), the Board has not always reached the same result in cases involving employers' disavowals of unlawful conduct by supervisors. This is not because the Board has been remiss in developing an "ascertainable standard," but rather because each case necessarily turns on its facts. A rigid, *per se* rule would be no more appropriate for determining the adequacy of disavowals than it would be in determining whether the remarks themselves were coercive in the first place. The Board's factual finding here is not "so wanting in rational basis as to require or permit reversal." *National Labor Relations Board* v. *Austin Powder Co.*, 350 F. 2d 973, 976 (C.A. 6).

The Company errs in asserting (Pet. 7) that the court of appeals upheld the Board's conclusions in the face of

its own determination "that the oral and written repudiations and reassurances were effective in negating the effects of the statements by Foreman Rike." The court merely observed that the Company's assurances had an "*apparently* reassuring effect on *at least Thompson and Curry*" and that the assurances were "more specific than the general statements rejected as inadequate in other cases" (Pet. App. 53a-54a; emphasis added). The court noted, however, that Rike's statements "were strong ones" and that the Board, considering "the whole record," did not err in determining that employees at the plant might have felt coerced despite the Company's disavowals.

The decisions cited by the Company (Pet. 9-12) as conflicting with the decision of the court below are distinguishable. In *Pittsburgh S.S. Co.* v. *National Labor Relations Board*, 180 F. 2d 731, 739 (C.A. 6), affirmed on other grounds, 340 U.S. 498, the court found that there was no evidence that the employer was aware of any of the incidents concerned. In the present case the Company was informed of its supervisor's action. In *National Labor Relations Board* v. *Garland Corporation*, 396 F. 2d 707, 709 (C.A. 1), the statements made by the supervisors were less serious than the discharge threats made by Supervisor Rike. In any event, it is appropriate for this Court, as it reiterated in *Pittsburgh S.S. Co., supra*, 340 U.S. at 503, to " 'adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' *Federal Trade Comm'n* v. *American Tobacco Co.*, 274 U.S. 543, 544."

2. There is no merit in the Company's contention (Pet. 14) that the Board erroneously failed to provide "any analysis or explication of the rea[s]ons for the need for a remedial order." The Board, as shown, found that

statements clearly violative of Section 8(a)(1) of the Act had been made by a Company supervisor and that the Company had not taken sufficient steps to repudiate his conduct. The Board thereupon (Pet. App. 15a-16a, 18a) issued a narrow cease-and-desist order and directed the posting of a notice in which the Company, backed by the authority of a federal agency, would assure the employees that no similar violations of the Act would in the future be committed on its behalf. Such cease-and-desist orders and notice-posting requirements have been used by the Board to assure employees of their rights from the earliest days of the Act's enforcement (see, *e.g.*, *National Labor Relations Board* v. *Falk Corp.*, 308 U.S. 453, 462), and these provisions "are proper and accepted remedies" for violations of Section 8(a)(1) of the Act. *National Labor Relations Board* v. *Better Val-U Stores of Mansfield, Inc.*, 401 F. 2d 491, 493 (C.A. 2). The remedial order in the present case, unlike the broad order which was before this Court in *May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 387 n. 6, is so closely tailored to the violations found that extensive "analysis" and "explication" are obviously unnecessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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